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THE COMPETENCY, AS WITNESSES, OF HUSBAND AND WIFE.

(*Continued from page* 365, *ante.*)

IX. CASES OF AGENCY.

(1.) *In general.*—Perhaps the most important exception to the rule in question is that it will not be applied to cases where the wife has acted for the husband in his business, and by his authority and consent; he thereby adopts her acts and will be bound by any admission or acknowledgment made by her respecting that business, and her testimony will be admissible touching anything she did as his agent, or within the scope of her delegated authority: *Wheeler & Wilson Mfg. Co.* v. *Tinsley*, 75 Mo. 458; *Degenhaart* v. *Schmidt*, 7 Mo. App. 117; *Lunay* v. *Vantyne*, 40 Vt. 501; *Birdsall* v. *Dunn*, 16 Wis. 235; *Chundt* v. *Laison*, 43 Id. 536. There are many cases asserting the admissibility of evidence of the *admissions* of the wife made out of court as to her agency and her acts done under it; but our purpose here is to ascertain her competency as a *witness testifying on the trial* respecting such acts, and the *factum* of her agency. See *Emerson* v. *Blondin*, 1 Esp. 142; 1 Str. 527; B. N. P. 287; *Anderson* v. *Saunderson*, Holt N. P. 591; *White* v. *Cuyler*, 6 T. R. 176; *Clifford* v. *Burton*, 1 Bing. 199; *Tenner* v. *Lewis*, 10 Johns. (N. Y.) 38; *Riley* v. *Suydam*, 4 Barb. (N. Y.) 222; *Williamson* v. *Morton*, 2 Md. Ch. 74; *Hughes* v. *Stokes*, 1 Hayw. (N. C.) 372; *Curtis* v. *Ingham*, 2 Vt. 289.

(2.) *Wife competent.*—The English rule was narrower than the one just stated. The admissions and declarations of the wife were admitted, and so far she was treated like any other agent, but she could not be called as a witness, while an ordinary agent could be: 1 Phil. Ev. sect. 83.

This distinction does not seem to have met with favor in this country, except, perhaps, in Arkansas. A late case in that state holds that neither husband nor wife can testify for or against the other in civil cases; not even when one acts as agent for the other: *Watkins* v. *Turner*, 34 Ark. 663. Compare *Magness* v. *Walker*, 26 Id. 370. The American rule seems to be that a wife is not a competent witness for her husband, *except* as to matters in which she has acted as his agent. The question whether she so acted in a given transaction (though she is probably a competent witness upon that question) is to be determined by the court before she is admitted to testify in chief; and the proof of her agency should generally be elicited by direct interrogatories on that subject: *Chundt* v. *Laison*, 43 Wis. 536; *Burke* v. *Savage*, 13 Allen (Mass.) 408; where she was held a competent witness to prove her agency, as well as her acts as agent. In Illinois, she is placed on the footing of a *feme sole*, so far as respects her competency to testify concerning transactions in which she acted as her husband's agent: *Poppers* v. *Miller*, 14 Ill. App. 87. In Indiana, it is held that communications between husband and wife relating to an agency conferred by him upon her are not confidential communications nor inadmissible in evidence: *Schmied* v. *Frank*, 86 Ind. 250. But the contrary doctrine is maintained in Tennessee: *Washington* v. *Bedford*, 10 Lea 243. During her husband's absence from home the wife acts as his agent in the care and protection of his property within the home limits, without any express direction or agreement, and is competent to testify as to what she does in that behalf in any action by or against him: *Fisher* v. *Conway*, 21 Kan. 18; *Town* v. *Lampshire*, 37 Vt. 52. If she keeps his accounts for him, she may testify that she made the entries by his directions and in his presence: *Littlefield* v. *Rice*, 10 Metc. (Mass.) 287. Being authorized by him to take care of his property and to notify the insurers in case of loss, she may testify in an action on the policy as to facts connected with his loss, and the insurers cannot show by her that he did not hold the legal title to the land, such fact not being within the scope of her agency:

O'Connor v. *Hartford Fire Ins. Co.*, 31 Wis. 161. Where he is sued for property pledged with her for money loaned, she may testify as to what contract she made with the plaintiff, and that she acted as her husband's agent in making it: *Summer* v. *Cooke*, 51 Ala. 521. If her husband gives her a note to collect she may prove her acts within the scope of her agency, in her husband's suit against the estate of the deceased maker: *Engenann* v. *Immel*, 59 Wis. 249. Where, through his acts of cruelty, she is compelled to leave his house, she may testify *against* him, when sued for necessaries furnished to her, and prove such acts of cruelty; and, in such a case, it is immaterial whether his liability be placed on the ground of her implied agency to contract for the necessaries, or on that of his marital duty: *Bach* v. *Parmely*, 35 Wis. 238.

(3.) *Wife incompetent.*—Ordinarily there must be proof of authority conferred, or ratification by the husband, or the wife will not be a competent witness to establish that a contract entered into by her with a third person is the contract of her husband made by her as his agent: *Bliss* v. *Franklyn*, 13 Allen (Mass.) 244. In Vermont, it is held that where the husband is temporarily absent from home for a day, leaving his wife without any special charge or agency, except "such as married women living and keeping house with their husbands would have in such cases," she is not his agent so as to be competent to testify for him as to matters transpiring during his absence: *Bates* v. *Cilley*, 47 Vt. 1. With all due respect, the writer submits that, as a general proposition, this is not sound law. Again, where the husband is sued for the price of goods purchased by him in the wife's presence, she assisting in their selection, she is not competent, on the ground of agency, to prove that the goods were furnished on the credit of a third person in the payment of the latter's indebtedness to the husband: *Tripp* v. *Barker*, 78 Ill. 146. So, it is held, that merely sending the wife to collect payment for goods sold by the husband does not make her his agent within the rule: *Robertson* v. *Brost*, 83 Ill. 116. And where a wife, being requested by her husband to call into their house the indorser of a note held by the husband, asked the indorser "whether he was going to pay the note," she was held not to be the husband's agent in such a sense as to be competent to testify to admissions made to her by the indorser which would render him liable on the note without presentment and demand of the maker: *Hale* v. *Danforth*, 40 Wis. 382.

(4.) *Husband as agent of wife.*—The same principle by the application of which the wife is permitted to testify as to her acts done as the agent of her husband, also admits the husband as a witness for his wife, as to acts done by him as her authorized agent: *Hobby* v. *Wisconsin Bank*, 17 Wis. 167; *Haule* v. *Kreihn*, 65 Mo. 202; *Chelsey* v. *Chelsey*, 54 Mo. 347. Thus, he may testify as to what disposition he has made of money belonging to her separate estate: *Robison* v. *Robison*, 44 Ala. 227. He may show what he did in her absence as well as what he did in her presence: *Mark* v. *Steinfert*, 39 Wis. 370. And he may also prove the *factum* of his agency and its extent: *Owen* v. *Cawley*, 36 Barb. (N. Y.) 52; see, also, *Arndt* v. *Harshaw*, 53 Wis. 269. But, as in the wife's case, an agency must appear; his action without her knowledge or consent will not constitute him her agent: *Case* v. *Colter*, 66 Ind. 336. Nor will the fact that he went with her when she made the bargain, and afterwards "about the matter of pay," without more, have that effect: *Waggonseller* v. *Rexford*, 2 Ill. App. 445.

X. Effect of consent, or release of interest.

(1.) *Consent.*—Upon the effect of the husband's consent that the wife be admitted as a witness against him, the authorities are not in harmony. Some of them take the ground that it is only the *interest* of the husband which excludes her, and inasmuch as an interested witness is competent to testify against his interest, provided he consents to do so, the wife may be properly admitted to testify against her husband's interest, he consenting that she do so: *Pedley* v. *Wellesly*, 3 Car. & P. 558.

But the better opinion seems to favor her exclusion as a witness against her husband, even though he consents; for the reason that the interest of the husband in preserving the confidence placed in her is not the only ground of the rule. The preservation of domestic tranquillity, and the diminution of temptations to commit perjury, are objects in which society at large is interested, and to admit her as a witness under such circumstances would be opposed to a sound public policy. See *Barker* v. *Dixey*, Cas. t. Hardw. 264; *Sedgwick* v. *Watkins*, 1 Ves. Jr. 49; *Randall's Case*, 5 City H. Rec. (N. Y.) 141, 153, 154; *Davis* v. *Dinwoody*, 4 T. R. 679.

(2.) *Release of interest.*—Clinging to the mistaken idea that individual interest, and not public policy, afforded the ground of the

rule, several highly respectable courts have held that a conveyance by husband and wife to the wife (*Meredith* v. *Hughes*, 28 Ga. 571), or by the husband to the wife (*Weems* v. *Weems*, 19 Md. 334), or by both to their children (*Meredith* v. *Hughes*, *supra*; contra, *Locke* v. *Noland*, 11 Ala. 249), of all their interest in the issue on trial, rendered them, or the one making such transfer, competent to testify in the cause, notwithstanding the existence of the marital relation. So, also, it has been decided, that the wife of a sole executor of a will, who has renounced, is competent to prove its execution as a will of real estate: *Daniel* v. *Proctor*, 1 Dev. L. (N. C.) 428; but compare *Huie* v. *O'Connell*, 2 Jones L. (N. C.) 455; that the wife of one of several co-defendants in foreclosure, who suffers the bill to be taken *pro confesso* as against her, thereby becomes competent for the other defendants: *Hadley* v. *Chapin*, 11 Paige (N. Y.) 245; that where the payee of a note endorses it to a third person, taking a release from liability thereon, his wife becomes competent for the holder: *Bisbing* v. *Graham*, 14 Penn. St. 14; *Armstrong* v. *Noble*, 55 Vt. 428; and that a wife, in the absence of her husband, who has been released from liability in the suit, is a competent witness therein: *Peaceable* v. *Keep*, 1 Yeates (Pa.) 576. See, also, *Borneman* v. *Sidlinger*, 21 Me. 185; *Thomas* v. *Catheral*, 5 Gill & J. (Md.) 23. But it is difficult to bring these cases within the true principle of the rule of exclusion, *i. e.*, that it is not *interest* only, but *public policy* which closes the door of the witness box.

XI. SURVIVING HUSBAND.—While, as we have seen, the dissolution of the marriage relation by the death of one of the parties, has not the effect of removing the incompetency of the other to disclose matters protected by the rule excluding husband and wife as witnesses for or against each other (*supra*, I.), yet, one having died, the other is competent as to anything the knowledge of which was not obtained through the privacy of the marriage relation: *Wooley* v. *Turner*, 13 Ind. 253; *Haugh* v. *Blythe*, 20 Id. 24; *Elswick* v. *Commonwealth*, 13 Bush (Ky.) 155; *English* v. *Cropper*, 8 Id. 292. But the husband cannot testify to conversations between himself and his deceased wife: *Dye* v. *Davis*, 65 Ind. 474; or against the interests of her estate: *Succession of Wade*, 21 La. Ann. 343; but see *Reilly* v. *Succession of Reilly*, 28 Id. 669, and *Ames's Succession*, 33 Id. 1317, which two cases seem to lean the other way. See, also, *Wood* v. *Bwillar*, 40 Iowa 591;

Jackson v. *Brooks*, 8 Wend. (N. Y.) 426; *Wallis* v. *Britton*, 1 Har. & J. (Md.) 478; *Ayres* v. *Ayres*, 11 Gray (Mass.) 130; *William & Mary College* v. *Powell*, 12 Gratt. (Va.) 372.

XII. WIDOW.—So, also, the widow is a competent witness as to matters in which her deceased husband was interested, unless she acquired her knowledge of the facts through confidential communications from him: *Ryan* v. *Follansbee*, 47 N. H. 100; *Jackson* v. *Barron*, 37 Id. 494; *Cornell* v. *Vanartsdalen*, 4 Barr (Pa.) 364; in which latter case she is incompetent: *Lingo* v. *State*, 29 Ga. 470; *Gray* v. *Cole*, 5 Harr. (Del.) 418. She may testify as to a conversation had in her presence, or overheard by her, between her husband and a third person: *Pratt* v. *Delavan*, 17 Iowa 307; *Stuhlmuller* v. *Ewing*, 39 Miss. 447; *Mercer* v. *Patterson*, 41 Ind. 440; *Griffin* v. *Smith*, 45 Id. 366; *Floyd* v. *Miller*, 61 Id. 224. She may prove her husband's acts, not affecting his character: *McGuire* v. *Maloney*, 1 B. Mon. (Ky.) 224; or such of his business transactions as were observed by her during his life, or came to her knowledge through sources other than communications by him to her: *Spivey* v. *Platon*, 29 Ark. 603; *Powell* v. *Powell*, 2 N. E. Rep. (Ill.) 162; *Short* v. *Tinsley*, 1 Metc. (Ky.) 397; *Stein* v. *Weidman*, 20 Mo. 17; *Gaskill* v. *King*, 12 Ired. L. (N. C.) 211; *Robb's Appeal*, 98 Penn. St. 501.

Thus, she may testify as to the execution, loss and contents of a bond given to her husband: *Carpenter* v. *Dame*, 10 Ind. 125; or that goods were received by the executor of her husband for which he has not accounted: *Sherwood* v. *Hill*, 25 Mo. 391; or that a deed of conveyance in which she joined with her husband was only intended to operate as a mortgage: *Price* v. *Joyner*, 3 Hawks (N. C.) 418; contra, *Eckford* v. *De Kay*, 6 Paige (N. Y.) 565; or that such a deed, so executed by her, was not fraudulent under the statute of 13 Elizabeth: *Chambers* v. *Spencer*, 5 Watts (Pa.) 404; or that a parol gift claimed to have been made by her husband, was, in fact, a loan: *Hay* v. *Hay*, 3 Rich. Eq. (S. C.) 384; or that a pretended purchase from him was never consummated: *Keys* v. *Baldwin*, 33 Tex. 666. She is also a competent witness in an action against her husband's administrator for her board: *Romans* v. *Hay*, 12 Iowa 270. She is competent for the executors when she has no interest in the result of the case: *Gebhart* v. *Shindle*, 15 S. & R. (Pa.) 237.

Where the litigation concerns the real estate of her deceased husband, she is not a competent witness, where the result can either increase or reduce her dower: *Wade* v. *Johnson*, 5 Humph. (Tenn.) 117; S. P. *Chaney* v. *Moore*, 1 Coldw. (Tenn.) 48; but if, in such a case, she is not entitled to dower: *Wallingford* v. *Fiske*, 24 Me. 386, or has released her right: *Dobson* v. *Racey*, 8 N. Y. 216; *Gayle* v. *Morrissey*, 5 Sneed (Tenn.) 445, or received her dower by consent of the heirs: *Morris* v. *Harris*, 9 Gill (Md.) 19, she is competent.

XIII. DIVORCED SPOUSE.—Nor will the dissolution of the marriage relation by judicial decree of divorce, or nullity of marriage, restrain the operation of the rule we are examining. As was well said by Lord ALVANLEY, "It never shall be endured, that the confidence which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved:" *Monroe* v. *Twistleton*, Peake Ev. App. lxxxvii. (xci.); *Aveson* v. *Lord Kinnaird*, 6 East 192; *Doker* v. *Hasler*, Ry. & M. 198. Thus, a wife who has been divorced from her husband continues to be incompetent to testify against him in respect to transactions which took place prior to the divorce and during coverture: *Barnes* v. *Camack*, 1 Barb. (N. Y.) 392; *Cook* v. *Grange*, 18 Ohio 526; *Perry* v. *Randall*, 83 Ind. 143; or in his favor, in an action by him against a third person for seducing her: *Rea* v. *Tucker*, 51 Ill. 110. See *infra*, XVI. She cannot testify to threats made to her by her husband, to compel her signature to a conveyance alleged to be void for duress: *Anderson* v. *Anderson*, 9 Kan. 112. Nor is she competent when the proceeding is instituted to set aside the divorce between herself and her deceased husband: *Fidelity Ins. Co.'s Appeal*, 93 Penn. St. 242; *Peterson* v. *Peterson*, 13 Phil. (Pa.) 82.

It has been held, however, that she may be permitted as a witness against the former husband, to prove a communication not confidential, but which it must have been intended by him at the time, she should make known to the public: *Crook* v. *Henry*, 25 Wis. 569; see, also, *Storms* v. *Storms*, 3 Bush (Ky.) 77, as to the competency of a divorced husband.

XIV. CASES OF PERSONAL INJURIES.—Where the ground of action is a personal injury sustained by the wife at the hands of a third person, the authorities are not in entire harmony as to the husband's competency to testify. In Georgia, the wife having been

assaulted, the husband was not permitted to testify that she delayed to complain to him: *Goodrum* v. *State*, 60 Ga. 509; see also *Pillow* v. *Bushnell*, 5 Barb. (N. Y.) 156. In Wisconsin, when both sue for injuries to the person of the wife, caused by the defendant's negligence, the husband is deemed the real party in interest, and may testify in support of the action, whatever the rule may be as to actions in which he is only a nominal party: *Kaime* v. *Omro Trustees*, 49 Wis. 371; *Barnes* v. *Martin*, 15 Wis. 240; and the wife is also competent in such cases tried in the United States Circuit sitting in that state: *Packet Co.* v. *Clough*, 20 Wall. (U. S.) 528. The rule was the same in Massachusetts, under chapter 188 of the Act of 1856: *Snell* v. *Westport*, 9 Gray (Mass.) 321; but see *Bunker* v. *Bennett*, 103 Mass. 516, where a contrary rule is laid down under a later statute; and is the same in Vermont: *Simpkins* v. *Eddie*, 56 Vt. 612. In New Hampshire, where the husband died after the injury to the wife, but before suit brought, the wife was held a competent witness: *Winship* v. *Enfield*, 42 N. H. 197. And in Vermont, where the wife sued a liquor dealer, under the "civil damage act," for injuries sustained by reason of the intoxication of her husband, the latter was held a competent witness for the plaintiff: Acts 1874, No. 27; *Snow* v. *Carpenter*, 49 Vt. 426. As to actions for malicious prosecution, see *Anderson* v. *Friend*, 71 Ill. 475; *Mitchinson* v. *Cross*, 58 Id. 366. Actions for slander of the wife, see *Hawver* v. *Hawver*, 78 Ill. 412; *Mousler* v. *Harding*, 33 Ind. 176; *Bennifield* v. *Hypres*, 38 Ind. 498; *Duval* v. *Davey*, 32 Ohio St. 604. Actions for mal-practice, see *Womack* v. *McQuarry*, 28 Ind. 103.

XV. ACTIONS FOR DIVORCE, OR TO ANNUL THE MARRIAGE.—The action being for divorce, the husband has been held competent to prove the wife's desertion of him: *Stebbins* v. *Anthony*, 5 Col. 348. So, also, the wife being complainant, she was allowed to testify as to her husband's habits of intoxication and general treatment of her: *Smith* v. *Smith*, 77 Ind. 80; *Burdette* v. *Burdette*, 2 Mackey (D. C.) 469. But the great weight of authority, especially where the ground of divorce is adultery, excludes both parties from testifying except to sustain the validity of the marriage to dissolve which the action is brought. Such is the law in Louisiana: *Dillon* v. *Dillon*, 32 La. Ann. 643; *Daspit* v. *Ehringer*, Id. 1174; see, also, *Shantz* v. *Stoll*, 34 Id. 1237; and, until very recently, in New

Jersey: *Marsh* v. *Marsh*, 2 Stew. (N. J.) 396; *Dougherty* v. v. *Dougherty*, 5 Id. 32; and in New York: *Van Cort* v. *Van Cort* 4 Edw. (N. Y.) 621; *Rivenburgh* v. *Rivenburgh*, 47 Barb. (N. Y.) 419; *Hennessey* v. *Hennessey*, 58 How. Pr. 304; *Lincoln* v. *Lincoln*, 6 Rob. (N. Y.) 525; *Finn* v. *Finn*, 12 Hun 339; and see, *Anable* v. *Anable*, 24 How. Pr. 92. *It seems* the husband may prove the wife's impotence: *Barringer* v. *Barringer*, 69 N. C 179; but not her adultery: *Cook* v. *Cook*, 46 Ga. 308. In Pennsylvania, the parties to the divorce may testify in their own favor, but cannot be compelled to testify against themselves: *Bronson* v. *Bronson*, 8 Phil. (Pa.) 261. They are excluded in Texas: *Cornish* v. *Cornish*, 56 Tex. 564, and admitted in Massachusetts, where the proceeding is for a decree of nullity, under the statute: Gen. St. ch. 107, § 4; *Foss* v. *Foss*, 12 Allen (Mass.) 26.

When the proceeding is a collateral one, *e. g.*, when a creditor of the husband sues to annul a judgment of separation of property between the husband and wife, the latter has been held competent to testify: *Keller* v. *Vernon*, 23 La. Ann. 164.

XVI. ACTIONS FOR ABDUCTION, OR FOR CRIMINAL CONVERSATION.—It is held in Minnesota, that even in an action by the husband against one who entices away the wife, when the defence is his ill-treatment of her, the wife cannot be a witness against her husband without his consent: *Huot* v. *Wise*, 27 Minn. 68; but the contrary was held in New York, in a proceeding to regain the custody of the wife by the writ of *habeas corpus*: *People* v. *Mercein*, 8 Paige (N. Y.) 47, and also in Pennsylvania, where her declarations immediately before and at the time of her leaving him, respecting his ill-treatment of her, were admitted in behalf of the defendant charged with enticing her away: *Gilchrist* v. *Bale*, 8 Watts (Pa.) 355.

In actions for criminal conversation the majority of the adjudications exclude the wife from testifying for the plaintiff: *Carpenter* v. *White*, 46 Barb. (N. Y.) 291; *Hicks* v. *Bradner*, 2 Abb. (N. Y.) Abb. Dec. 362; *Mathews* v. *Yerex*, 48 Mich. 361, unless a divorce has been obtained previous to the trial, when she is competent as to facts occurring after the divorce, in which her husband did not participate: *Cross* v. *Rutledge*, 81 Ill. 26 6; or, according to several highly respectable authorities, even to prove the charge laid in the declaration: *Dickerman* v. *Graves*, 6 Cush. (Mass.) 308; *Rateliff*

v. *Wales*, 1 Hill (N. Y.) 63; *Woltrich* v. *Freeman*, 71 N. Y. 601.

XVII. Criminal Actions.

(1.) *In general.*—We have already seen that one of the exceptions to the common-law rule excluding husband and wife as witnesses, is, that in collateral proceedings, they may testify to facts which even tend to criminate each other: *supra*, VIII.; *Commonwealth* v. *Reid*, 8 Phila. (Pa.) 385; s. c. 1 Leg. Gaz. Rep. 132; but see *State* v. *Wilson*, 2 Vr. (N. J.) 77. Where, however, a criminal prosecution is instituted against either spouse, the other is generally excluded as a witness either for or against the one on trial, both on grounds of public policy, and in order to lessen the temptation to commit perjury: *Lucas* v. *State*, 23 Conn. 18; *William* v. *State*, 33 Ga. (Supp.) 85; *Byrd* v. *State*, 57 Miss. 243; *Downing* v. *Rugar*, 21 Wend. (N. Y.) 178; *Wilke* v. *People*, 53 N. Y. 525; *People* v. *Briggs*, 60 How. (N. Y.) Pr. 17; *People* v. *Moore*, 65 Id. 177; *Taulman* v. *State*, 37 Ind. 353; and the so-called "enabling acts" have not affected this rule, their operation being, for the most part, confined to civil causes: *Turpin* v. *State*, 55 Md. 462; *Com.* v. *Gannon*, 97 Mass. 547; *Com.* v. *Welch*, Id. 593; *State* v. *Armstrong*, 4 Minn. 335; *State* v. *Moulton*, 48 N. H. 485; *People* v. *Crandon*, 17 Hun (N. Y.) 490; but compare *People* v. *Comm'rs of Charities*, 9 Id. 212; *Steen* v. *State*, 20 Ohio St. 333; *Shultz* v. *State*, 32 Id. 276; *Gibson* v. *Com.*, 87 Penn. St. 253.

Where, however, the cohabitation is meretricious, and not pursuant to a lawful marriage, the rule has no application: *Rickenstriker* v. *State*, 31 Ark. 207; *Mann* v. *State*, 44 Tex. 642; and the fact that the alleged marital relation does not exist may be proved by the witness on the *voir dire*: *State* v. *Brown*, 28 La. Ann. 279. But the converse, it seems, is not true, *i. e.*, where the prosecution has shown an actual marriage between the defendant and one of its female witnesses, *prima facie* valid and in good faith, upon which the defendant might reasonably and honestly rely as valid, and upon which he did rely at the trial, the prosecution cannot introduce opposing testimony in order to establish the invalidity of the marriage, so as to make the alleged wife a competent witness against the defendant: *Dixon* v. *People*, 18 Mich. 84.

Various statutory modifications of the rule have been made in many of the states; thus, in Kansas, the wife of the accused is competent for the state if she voluntarily testifies against her hus-

band. She cannot be compelled to do so: *State* v. *McCord*, 8 Kan. 232. But she may be so compelled in Maine: Stat. 1873, ch. 137, sect. 5; *State* v. *Black*, 63 Me. 210. In New York she may testify in her husband's favor, but cannot be compelled to be a witness against him. The husband, however, may compel her testimony, and his failure to call her is properly the subject of comment to the jury: *People* v. *Hovey*, 92 N. Y. 554; s. c., 29 Hun 382. In North Carolina and Rhode Island, where the husband is the complainant against the one charged with assault the wife has been held a competent witness in the case, either to support the prosecution or to contradict her husband's testimony for the state: *State* v. *Parrott*, 79 N. C. 615; *State* v. *Borden*, 6 R. I. 495. In Texas, husband and wife are competent for each other in criminal cases, but not against each other: *Griffin* v. *State*, 32 Tex. 164 (where the right of the prosecution to cross-examine was denied); *Creamer* v. *State*, 34 Tex. 173 (where such right was sustained); and if either be competent against the person on trial the other is also: *Daffin* v. *State*, 11 Tex. App. 76.

(2.) *Offences committed by one against the other.*—Where the offence on trial is a personal injury alleged to have been committed by the husband upon the wife, or *vice versa*, the injured spouse is a competent witness in favor of the one on trial: *People* v. *Fitzpatrick*, 5 Park. Cr. (N. Y.) 26; compare *Bihin* v. *Bihin*, 17 Abb. Pr. (N. Y.) 19, or on the part of the prosecution: *People* v. *Carpenter*, 9 Barb. (N. Y.) 580. Thus, the husband being indicted for assault and battery upon his wife, she is competent to testify against him: *United States* v. *Fitton*, 4 Cranch C. C. 668; *United States* v. *Smallwood*, 5 Id. 35; *Turner* v. *State*, 60 Miss. 351; s. c., 45 Am. Rep. 412, at least, where a lasting injury is inflicted or threatened to be inflicted upon her: *State* v. *Hussey*, Busb. L. (N. C.) 123; *State* v. *Davidson*, 77 N. C. 522, or where no other person was present when the offence was committed: *State* v. *Davis*, 3 Brev. (S. C.) 3; and it seems she is compellable to testify in such cases: *Turner* v. *State*, *supra* (which case decides that it is *her privilege* to testify or not as she may elect. Her husband cannot complain of the action of the court in compelling her to give evidence over his objection). So, also, she may testify against her husband on his trial for attempting to poison her: *People* v. *Northrup*, 50 Barb. (N. Y.) 147, or for using an instrument with intent to cause her to miscarry: *State* v. *Dyer*, 59 Mo. 303, or on his

trial for abandoning her: *State* v. *Brown*, 67 N. C. 470 (only to prove the fact of abandonment, however, not to prove the marriage). She cannot, however, testify against him on his trial for conspiring to obtain a divorce, unless the indictment charges the commission of personal violence upon her, or the intention to commit it: *Com.* v. *McEwan*, 1 Pa. L. J. Rep. 140, or on his trial for suborning witnesses to wrong her in a judicial proceeding: *People* v. *Carpenter*, 9 Barb. (N. Y.) 580. Nor can she be a witness against him on his trial for the larceny of her property: *Overton* v. *State*, 43 Tex. 616; *R.* v. *Brittleton*, 12 Q. B. D. 266; s. c., 32 W. R. 463, or for incest with her daughter by a former marriage: *Compton* v. *State*, 13 Tex. App. 271; s. c. 44 Am. Rep. 703; overruling *Morrill* v. *State*, 5 Tex. App. 447, and *Roland* v. *State*, 9 Id. 277.

On the other hand, on her husband's trial for assault and battery upon herself, she may testify in his favor to disprove the charge: *State* v. *Neill*, 6 Ala. 685; *Com.* v. *Murphy*, 4 Allen (Mass.) 491; *Tucker* v. *State*, 71 Ala. 342; for it is well settled that when, in any case, husband and wife are competent witnesses *against* each other, they are also competent witnesses *for* each other: *Tucker* v. *State*, 71 Ala. 342. So, where the wife is prosecuted for assaulting the husband, he is a competent witness against her: *Whipp* v. *State*, 34 Ohio St. 87; see, also, *People* v. *Marble*, 38 Mich. 117; contra, *Turnbull* v. *Com.*, 79 Ky. 495.

(3.) *Wife of party jointly indicted.*—Another exception to the general rule is that where, upon a joint indictment, there is a separate trial the husband or wife of the defendant not put upon trial, is not necessarily incompetent as a witness for the prosecution. If willing to testify, he or she is competent, except, perhaps, where the offence is in its nature joint, as in conspiracy: *Com.* v. *Reid*, 8 Phila. (Pa.) 385; s. c. 1 Leg. Gaz. Rep. 182; *State* v. *Dawdy*, 14 Rich. (S. C.) 87, where the acquittal of one defendant works the acquittal of the others: *United States* v. *Addate*, 6 Blatchf. (U. S.) 76; *Williams* v. *State*, 69 Ga. 11; but see to the contrary, *State* v. *Bradley*, 9 Rich. (S. C.) 168; *State* v. *McGrew*, 13 Id. 316; *State* v. *Burlingham*, 15 Me. 104. Where the husband is suspected, but not indicted, and the defendant seeks to show the husband to be the guilty party, the wife may testify to facts exculpatory of her husband: *Fincher* v. *State*, 58 Ala. 215.

So also, the wife of one of three jointly indicted defendants is competent against the other two, after the indictment has been dismissed as to her husband: *Ray* v. *Com.*, 12 Bush (Ky.) 397; but not, it seems, before such dismissal: *Dill* v. *State*, 1 Tex. App. 278. And where the husband is defaulted on his recognisance, the wife becomes competent for the other defendant: *State* v. *Worthing*, 31 Me. 62. Indeed, she is generally held competent in such cases when she is offered as a witness *in favor* of the defendant on trial: *Thompson* v. *Com.*, 1 Metc. (Ky.) 13; *Cornelius* v. *Com.*, 3 Id. 481; *State* v. *Burnside*, 37 Mo. 343; *Com.* v. *Manson*, 2 Ashm. (Pa.) 31; *Moffit* v. *State*, 2 Humph. (Tenn.) 99; *Workman* v. *State*, 4 Sneed (Tenn.) 425; although respectable cases are not lacking which hold the other way: *United States* v. *Wade*, 2 Cranch C. C. 680; *Collier* v. *State*, 20 Ark. 36; *Pullen* v. *People*, 1 Doug. (Mich.) 48.

Where the trial as well as the indictment is joint, it is pretty well settled that the wife of one defendant is not a competent witness for any of the others: *Commonwealth* v. *Easland*, 1 Mass. 15; *Com.* v. *Robinson*, 1 Gray (Mass.) 555; *State* v. *Waterman*, 15 S. C. 540; *Mask* v. *State*, 32 Miss. 405; but see *Morrisey* v. *People*, 11 Mich. 327; *State* v. *Waterman*, 1 Nev. 543.

(4.) *Wife of accomplice, or state's witness.*—Where the husband has testified as an accomplice, or state's witness, his wife is a competent witness to corroborate his testimony: *State* v. *Moore*, 25 Iowa 128; *Haskins* v. *People*, 16 N. Y. 344; *Blackburn* v. *Commonwealth*, 12 Bush (Ky.) 181; *Williams* v. *State*, 69 Ga. 11; especially where he has not been indicted, though evidently an accomplice: *Powell* v. *State*, 58 Ala. 362. So, also, she may prove any independent facts not sworn to by her husband, and not forming any part of his acts, although those facts fasten a guilty knowledge on the defendant: *United States* v. *Horn*, 5 Blatchf. (U. S.) 102. She may also testify on the other side, to show that her husband testified under a bias against the defendant, but not to contradict him: *Cornelius* v. *State*, 12 Ark. 782. See, also, *Clubb* v. *State*, 14 Tex. App. 192; *State* v. *Mooney*, 64 N. C. 54.

(5.) *Wife of person injured by the crime.*—At common law, where the person whose goods were stolen was not interested in the prosecution of the thief, his wife was a competent witness for the prosecution, but where the husband was himself disqualified by

reason of an interest in the fine, she was not competent: *United States* v. *Shorter*, 1 Cranch C. C. 315. But this rule of exclusion of the wife because of the husband's interest in the event is now swept away by the enabling acts, along with the incompetency of the husband himself—the person injured—on account of his interest. When the prosecution is for the homicide of the husband, the widow is a competent witness to prove his dying declarations: *State* v. *Ryan*, 30 La. Ann., part 2, 1176.

(6.) *Rules peculiar to prosecutions for adultery.*—Upon the question whether, upon a criminal prosecution for adultery, the husband or wife, of either of the guilty persons, shall be admitted to testify for the prosecution, the decisions are in direct conflict. Some of them hold that under statutes permitting husband and wife to testify against one another on a criminal prosecution, for an offence committed by one against the other, the one may testify against the other on an indictment of the other for adultery: *Roland* v. *State*, 9 Tex. App. 277: s. c. 35 Am. Rep. 743; *Alonzo* v. *State*, 15 Tex. App. 378; *Morrill* v. *State*, 5 Id. 447; *Lord* v. *State*, 23 N. W. Rep. 507. In Wisconsin it is held that after a divorce *à vinculo*, the husband is competent to prove the marriage on an indictment against another for adultery with the wife, before divorce: *State* v. *Dudley*, 7 Wis. 664.

Many cases, however, of equal respectability are found which lay down the contrary rule. Thus, the Supreme Court of Alabama holds that the husband of a woman jointly indicted with her paramour for living in adultery, is incompetent to testify against either of them: *Cotton* v. *State*, 62 Ala. 12. In North Carolina, he cannot testify against the female defendant (his wife), even though he may have obtained an absolute divorce before the trial of the indictment: *State* v. *Jones*, 89 N. C. 559 (where, however, he was permitted to testify in her favor); nor can he testify for the prosecution in Pennsylvania: *Commonwealth* v. *Gordon*, 2 Brewst. (Pa.) 569; *Commonwealth* v. *Flohr*, 3 Crim. L. Mag. 841; and the same has been held in Maine, Massachusetts and Texas: *State* v. *Welch*, 26 Me. 30; *Commonwealth* v. *Sparks*, 7 Allen (Mass.) 534; *Thomas* v. *State*, 14 Tex. App. 70; see also to same effect, *State* v. *Gardner*, 1 Root (Conn.) 485; *Commonwealth* v. *Jailer*, 1 Grant Cas. (Pa.) 218; and see *People* v. *Hendrickson*, 19 N. W. Rep. 169.

(7.) *Rules peculiar to prosecutions for bigamy.*—Here, too, the cases are in conflict, some of them holding the first wife of the alleged bigamist competent to testify against him, on the ground that his second marriage is an offence committed against her: *State* v. *Sloan*, 13 Chic. L. N. 145; see also, *People* v. *Houghton*, 24 Hun (N. Y.) 501; *State* v. *Hughes*, 58 Iowa 165; *Williams* v. *State*, 67 Ga. 260. So, also, the second wife been admitted to testify for the prosecution: *Johnson* v. *State*, 61 Ga. 305; *Finney* v. *State*, 3 Head (Tenn.) 544. But the true rule as to the second wife, is believed to be the following, recently laid down by the Supreme Court of the United States: "The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife, by proof of the fact that the accused had previously married another wife, who was still living, and still his lawful wife. It is only in case the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first:" *Miles* v. *United States*, 103 U. S. 304, 313; s. c. 2 Crim. L. Mag. 489; reversing, 2 Utah T. 19, and reviewing the early English cases.

STEWART RAPALJE.

RECENT AMERICAN DECISIONS.

Supreme Court of Minnesota.

NEWELL *v.* MINNEAPOLIS, L. & M. RAILWAY CO.

The public easement in a public street is the public and common right to use the same for the passage of persons and property, and for purposes incidental to such passage.

The owner of the soil over which a street is laid has the right to insist that a street shall be used for the legitimate purposes of its creation and existence, and in a manner proper to effectuate the same.

When a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the *mode* of use, the question of *rightfulness* depends upon whether the use objected to is consistent or inconsistent with the common public use in which every person is entitled to share. This question of consistency or inconsistency is a question of law. That is to say, the *facts* of a given case being ascertained, it is for the court to pronounce upon their effect, and to determine whether a manner of using a street complained of is or is not, all things considered, a substantial infringement upon the common public right.